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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1928.

No. ~~752~~ 47

HENRY FORD & SON, INC., PETITIONER,

vs.

LITTLE FALLS FIBRE COMPANY, ASBESTOS SPINNING AND WEAVING CORPORATION, AND HARRY A. FURMAN, CHARLES H. BURROWS, AND CLARENCE T. WRIGHT, AS RECEIVERS OF MOHAWK PAPER MAKERS, INC., RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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Albany, N. Y.,
CHARLES E. NICHOLS, JR.,
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(34,061)

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PETITION FOR WRIT OF CERTIORARI.

To the Supreme Court of the United States and to the Honorable Justices thereof:

The petition of Henry Ford & Son, Inc., respectfully shows:

First. On July 17, 1925, the above named respondents (plaintiffs below) commenced a suit in equity in the Supreme Court of New York, Saratoga County,

against your petitioner (defendant below) and therein alleged:

(*a*) That respondents were the owners of certain mills and factories located on a branch of the Mohawk River, a short distance west of its confluence with the Hudson River, which were operated by means of water power (R. 19).

(*b*) That petitioner in 1922 constructed an hydro-electric power plant at the westerly end of a concrete dam, extending across the Hudson River between the City of Troy, New York, and the Village of Green Island, New York, a short distance downstream from the confluence of the Mohawk and Hudson Rivers, which dam was erected by the United States in 1915; and that ever since the erection of said power plant petitioner has operated the same by means of water drawn from the pool formed by said dam (R. 20).

(*c*) That in June, 1925, petitioner, for the purpose of aiding and improving the operation of its plant and increasing the power which it could procure therefrom, erected barriers or boards, known as flashboards, upon the crest of said dam, whereby the height of the dam and the elevation of the water impounded thereby were raised upwards of 2 feet (R. 20).

(*d*) That the erection of said flashboards raised the elevation of the waters of the Hudson and Mohawk Rivers, deprived respondents of a part of their water power, and reduced the head available to them in the operation of their mills and factories (R. 21).

(*e*) That respondents were entitled to an injunction, restraining petitioner from maintaining said flashboards, and damages previously caused thereby (R. 21-22).

Second. In said suit petitioner appeared and alleged:

(*a*) That it had erected and was operating its hydroelectric power plant under and by virtue of a license granted to it on March 3, 1921, by the Federal Power Commission, which Commission was created by Act of Congress of June 10, 1920, commonly known as the Federal Water Power Act (16 U. S. C., Chap. 12), by which license petitioner was authorized by the Federal Power Commission to construct, maintain and operate said power plant, which the Commission had duly found to be desirable and justified in the public interest for the purpose of improving and developing the Hudson River, a navigable stream, for the use and benefit of interstate and foreign commerce (R. 24-25).

(*b*) That said flashboards were erected and maintained by petitioner pursuant to said license, and regulations of the Federal Power Commission approved by the Secretary of War (R. 25).

(*c*) That the Federal Water Power Act, said license issued to petitioner by the Federal Power Commission, and said regulations so approved by the Secretary of War constitute and afford the title, right, privilege and immunity which petitioner sets up and claims to erect and maintain said flashboards (R. 25).

(*d*) That in erecting and maintaining said flashboards petitioner acted for and as an agency of the government of the United States which, in the exercise of the power of Congress to regulate commerce with foreign nations and among the several states, as granted by clause 3 of Section 8 of Article I of the Constitution of the United States, has authorized and approved the erection and maintenance of said flashboards for the benefit of interstate and foreign commerce (R. 26).

Third. In the Supreme Court of New York your petitioner contended that the respondents were not entitled to the relief demanded in their complaint because of the facts set forth in paragraph "Second" hereof, namely:

1. The title, right, privilege and immunity of your petitioner to erect and maintain said flashboards under the Federal Water Power Act, June 10, 1920, c. 285, 41 Stat. 1063 (16 U. S. C., chap. 12); and a water power license issued by the Federal Power Commission to your petitioner, as supplemented by regulations of said Commission approved by the Secretary of War (R. 24-25, 57).

2. In erecting and maintaining said flashboards your petitioner acted for and as an agency of the Government of the United States for the benefit of interstate and foreign commerce, under Clause 3 of Section 8 of Article I of the Constitution of the United States (R. 26, 56, 57).

Fourth. After hearing the allegations and proofs of the parties, the State Supreme Court made its decision and rendered judgment for the respondents against your petitioner, enjoining forever your petitioner from maintaining flashboards or other obstructions on the crest of said dam and for money damages (R. 68), refusing to find as conclusions of law, as requested by your petitioner, the contentions of your petitioner as set forth in paragraph "Third" hereof (R. 57) and refusing also to hold, as requested by your petitioner, that the provisions of the Fifth Amendment of the Constitution of the United States and the provisions of Section 10 (*c*) of the Federal Water Power Act (16 U. S. C., § 803 (*c*)) do not entitle respondents to maintain this action (R. 58) (R. 28-39; 127 Misc. (N. Y.) 834).

Fifth. From said judgment your petitioner duly appealed to the Appellate Division of the Supreme Court in and for the Third Judicial Department of the State of New York where, upon the argument of said appeal, your petitioner duly urged against the validity of said judgment the contentions hereinbefore specified in paragraphs "Second" and "Third" of this petition, but said Appellate Division of the Supreme Court, by a vote of 4 to 1, overruled said contentions and, by judgment entered in the Supreme Court on June 2, 1928, affirmed the judgment appealed from (R. 16, 312-317, 319-324; 223 App. Div. (N. Y.) 559).

Sixth. From said judgment of said Appellate Division your petitioner duly appealed to the Court of Ap-

peals of the State of New York, which was and is the highest court of said state in which could be had a decision of the questions so raised by said contentions of your petitioner, hereinbefore specified in paragraphs "Second" and "Third" of this petition, and which contentions your petitioner duly urged upon the argument of said appeal to the Court of Appeals of the State of New York. But said Court of Appeals overruled said contentions and, by its final judgment rendered December 31, 1928, affirmed said judgment of said Appellate Division of the Supreme Court, and the Court of Appeals thereupon sent down its remittitur (R. 326) to the Supreme Court of the State of New York, consisting of a certified copy of said final judgment of said Court of Appeals and of the papers upon which said Court of Appeals made its said final judgment, and said remittitur was filed on the 18th day of January, 1929, in the office of the Clerk of the Supreme Court of the State of New York in and for the County of Saratoga, where said remittitur now remains of record. No copy of the record was retained by the Court of Appeals. Upon said remittitur an order and judgment were entered on said 18th day of January, 1929 in the office of said Clerk of said Supreme Court, where said remittitur is now on file and of record, whereby the judgment of the Court of Appeals herein was made the judgment of said Supreme Court of the State of New York (R. 317-318; 326-340; 249 N. Y. 495—Official Advance Sheets of New York Reports No. 1465 for January 26, 1929).

Seventh. In said final judgment of the Court of Appeals, re-examination and reversal of which by this Court your petitioner seeks, the decision was against a title, right, privilege and immunity especially set up and claimed by your petitioner in said Court of Appeals, as well as in each of the other courts of the State of New York which has passed upon and adjudged the matter in controversy herein set forth, under the Commerce Clause of the Constitution of the United States, under a statute of the United States, to wit, said Federal Water Power Act and under said license to your petitioner from the Federal Power Commission, as supplemented by the regulations of said Commission, as approved by the Secretary of War, and the authority exercised thereunder, all as set forth in paragraphs "Second" and "Third" of this petition.

Eighth. A certified transcript of the record in said case, including the proceedings in the Supreme Court of the State of New York, to which a writ of certiorari is asked to be directed, accompanies this petition.

Ninth. The reasons on which your petitioner relies for an allowance of the writ herein sought are:

(*a*) The State courts have decided in this case a substantial Federal question not heretofore determined by this Court, namely, the title, right, privilege and immunity of a licensee under the Federal Water Power Act.

(*b*) The decision of the State courts in this case tends to limit and narrow the power of Congress over

navigation, in furtherance of interstate and foreign commerce, as exerted by Congress in the Federal Water Power Act.

(*c*) The Court of Appeals has held in this case that the finding by a department of the Federal Government, detailed by Congress to determine the fact whether or not the erection of a given structure in navigable waters of the United States is in the interest of interstate and foreign commerce, is not conclusive on the State courts.

Opinion of Pound, J., in Court of Appeals.

> "The finding of the Commission that the project work is in aid of navigation is not conclusive on the courts in the absence of evidence to support it, even though the license is in form within the delegated powers of the Federal Water Power Commission" (R. 334, 249 N. Y. 495, 501-502).

Such conclusion is conceived by your petitioner to be in conflict with the following decisions of this Court:

South Carolina *v.* Georgia, 93 U. S. 4.

Wisconsin *v.* Duluth, 96 U. S. 379.

Miller *v.* Mayor of N. Y., 109 U. S. 385, 393-394.

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Monongahela Bridge Co. *v.* United States 216 U. S. 177, 195.

United States *v.* Chandler-Dunbar Co., 229 U. S. 53, 64-65.

(*d*) The power of Congress to permit the erection or use of dams and other structures in navigable streams for the development of water power, which is denied by the Court of Appeals, per Andrews, J.:

> "Taken at its face value the act does more than refer to navigation. It permits dams for the development of water power. This Congress has no power to do" (R. ~~344~~ 339, 249 N. Y. 495, 507).

involves a question of great public interest which ought to be decided by this Court.

WHEREFORE your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this court, directed to the Supreme Court of the State of New York, held in and for the County of Saratoga in said State, commanding said court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record in said action to the end that the errors of which your petitioner complains herein may be reviewed and corrected by this court conformably to law.

Dated February 19, 1929.

HENRY FORD & SON, INC.,
By ROBERT E. WHALEN,
CHARLES E. NICHOLS, JR.,
Counsel.

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BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The opinions of the State courts are reported as follows:

Supreme Court: 127 Misc. (N. Y.) 834 (R. 28).

Appellate Division: 223 App. Div. (N. Y.) 559 (R. 319).

Court of Appeals: 249 N. Y. 495—Official Advance Sheets of New York Reports No. 1465 for Jan. 26, 1929 (R. 331).

Jurisdiction.

1. Date of final judgment to be reviewed is December 31, 1928 (R. 326).

2. The following claims were advanced by petitioner in the State courts, each of which was denied:

(*a*) That the Federal Water Power Act, a license issued by the Federal Power Commission to petitioner, and regulations approved by the Secretary of War constituted and afforded to petitioner a title, right, privilege and immunity to install and maintain flashboards on the Federal dam in the Hudson river at Troy (R. 25, 57).

(*b*) That the title, right, privilege and immunity, so set up and claimed by petitioner, are not contravened by the just compensation clause of the Fifth Amendment to the Constitution of the United States (R. 58).

(*c*) That the title, right, privilege and immunity, so set up and claimed by petitioner, are not affected by the provisions of Section 10 (*c*) of the Federal Water Power Act (U. S. Code, Title 16, ch. 12, sec. 803-*c*) (R. 58).

(*d*) That in installing and maintaining said flashboards petitioner acted for and as an agency of the Government of the United States which, in the exercise of the power of Congress to regulate commerce with

foreign nations and among the several States, under Clause 3 of Section 8 of Article I of the Constitution of the United States, has authorized, approved and provided for the installation and maintenance of said flashboards for the improvement of navigation, in furtherance of interstate and foreign commerce (R. 26, 57).

3. The statutory provisions, under which the jurisdiction of this Court is invoked, are contained in the Act of February 13, 1925, ch. 229, sec. 1, 43 Stat. 937 (Judicial Code, Sec. 237 (*b*); U. S. Code, Title 28, Sec. 344 (*b*)).

4. In accordance with the New York practice, the Court of Appeals sent down its *remittitur,* consisting of the printed record and its final judgment thereon, to the Supreme Court of New York, where the same now remain on file and of record. The following cases are believed to sustain the jurisdiction of this Court:

(*a*) The writ sought should be directed to the Supreme Court of New York:

Hodges *v.* Snyder, 261 U. S. 600;
Longest *v.* Langford, 274 U. S. 499.

(*b*) Substantial Federal questions are presented:

Shively *v.* Bowlby, 152 U. S. 1;
Stanley *v.* Schwalby, 162 U. S. 255;
Green Bay Co. *v.* Patten Paper Co., 172 U. S. 58;
United States *v.* Chandler-Dunbar Co., 229 U. S. 53;
California *v.* Deseret W. O. & I. Co., 243 U. S. 415.

Statement of the Case.

Respondents are the owners of certain land, riparian and water rights and water power rights upon the so-called north or fourth branch of the Mohawk river, west of the confluence thereof with the Hudson river, in the town of Waterford, Saratoga County, New York, at which site, for about one hundred years last past, respondents and their respective predecessors in title have jointly owned and maintained a dam across said branch of the Mohawk, and a power canal leading from the pool formed by said dam, for the purpose of developing and using water power in the mills and factories of the respondents which are severally owned by them upon the land adjacent thereto (R. 40, 47).

Prior to the year 1915, there existed across the Hudson river, extending from the city of Troy westerly to the village of Green Island, a so-called State dam, the crest elevation of which was 13.23 feet barge canal *datum,* with flashboards two feet in height upon the crest thereof (R. 41, 48). About the year 1915, the United States of America, pursuant to Acts of Congress (R. 48), completed the construction of a concrete dam known as the Federal dam, across the Hudson river, a short distance above the site of said State dam, about 15,000 feet or nearly three miles below respondents' plants. This new Federal dam replaced the old State dam (R. 41, 48), and has at its easterly end a lock for the passage of boats (R. 86). It consists of two spillways, of which the east or so-called main spillway, extending perpendicularly out from the east

bank of the river, has an elevation at the crest of 15.2 feet, while the west or so-called auxiliary spillway, extending diagonally downstream to the west bank of the river, has an elevation at the crest of 17.2 feet (R. 41, 48). When the United States Government constructed this dam *it provided on the main or easterly spillway concrete holes for the installation of flashboards* (R. 49).

The Federal Power Commission, a body consisting of the Secretary of War, the Secretary of the Interior and the Secretary of Agriculture, was established by the Act of Congress approved June 10, 1920, known as the Federal Water Power Act (June 10, 1920; c. 285, 41 Stat. 1063; U. S. Code, Title 16, Ch. 12) (R. 49). On December 22, 1920, petitioner, a corporation of the State of New York, authorized and empowered to utilize water power and to do all business necessary to effect the purposes of a license under said Federal Water Power Act (R. 49), filed with said Commission its application for a license for an hydroelectric power project at the westerly end of said Federal dam in the village of Green Island (R. 49). This application contained, among others, the following statements:

> "The applicant will erect flashboards along the main spillway section of the dam as contemplated and provided for by the Corps of Engineers of the United States Army. The level of the water in the pond will not be drawn below the present crest of the dam and navigation will not be interfered with in any way" (R. 50)

(Petitioner's Exhibit 9, page 5, filed in U. S. Supreme Court Clerk's office).

"Flashboards two feet in height will be used on the main spillway section of dam utilizing the holes provided for that purpose in the spillway crest."

"No flashboards will be used on auxiliary spillway section."

"The flashboards will cause the pool level to be slightly higher than at present with ordinary flow conditions but in flood times the flashboards will go out and the flood level will be no higher than at present. In low water conditions the water level in the pool may be either slightly higher or lower than at present, depending on the daily load curve of the power station" (R. 50, Petitioner's Exhibit 9, pages 27-28).

"The use of flashboards will result in the creation of a reserve of water ponded during the night when the entire flow is not required. The water thus conserved will be available for lockage purposes and will increase the power available at times of low river flow. Flashboards will also provide a greater average head on the water wheels and will consequently permit the generation of more power with the same amount of water."

"In brief the use of flashboards on the dam will result in a higher degree of 'conservation and utilization in the public interest of the available water resources for purposes of both power and navigation'" (R. 50, 51, Petitioner's Exhibit 9, pages 32-33).

On March 3, 1921, the Federal Power Commission granted petitioner's said application and issued to petitioner its water power license, in and by the terms of which the application of petitioner was made a part of the license (R. 51, 297-305).

Petitioner was authorized by this license to construct, maintain and operate a power plant at the westerly end of the Federal dam. In or about the year 1922, acting under the license thus granted by the Federal Power Commission, petitioner constructed an hydro-electric power plant at the location specified, and ever since then it has operated said plant by means of water drawn from the pool formed by the Federal dam (R. 41, 52).

In the license the Federal Power Commission found, among other things: "that the said project, including the maps, plans, and specifications are best adapted to a comprehensive scheme of improvement and utilization of said stream *for purposes of navigation,* of water-power development, and of other beneficial uses; and that the contemplated improvement is desirable and justified in the public interest for the purpose of improving and developing the Hudson river for the use and benefit of interstate or foreign commerce" (R. 52, 298).

Since the application of petitioner contained statements that it would erect flashboards on the main spillway of the dam, and the Federal Power Commission found that the maps, plans and specifications contained in the application were best adapted to the improvement of the stream for purposes of navigation

and that the contemplated improvement was desirable for the purpose of improving the Hudson river for the benefit of interstate and foreign commerce, there was an express finding by the Commission that flashboards were an aid to navigation.

Paragraph 7 of said license provides:

> "The Licensee shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including the control of the level of pools, as may be made from time to time by the Secretary of War" (R. 52-53, 301).

Sec. 18 of the Act contains the same provision (U. S. Code, Title 16, Sec. 811).

By the granting of the license petitioner was authorized by the Federal Power Commission to erect flashboards, because they were provided for in the application, which was made a part of the license, and the licensee was authorized to construct the works described in the application (R. 299). But, under paragraph 7 of the license last above quoted, and Section 18 of the Act, the Secretary of War might at any time compel their removal or make other rules and regulations with reference to the level of the pool. Consequently it was highly desirable for petitioner to ascertain the attitude of the Secretary of War.

Accordingly petitioner, in a letter dated September 22, 1924 (R. 295), requested the War Department "that we be permitted to install flashboards on the Troy dam in connection with the operation of our power house," in accordance with blue prints attached to said

letter (R. 53). The War Department, on January 12, 1925, wrote a letter to petitioner (R. 295-296), in which there were enclosed certain regulations approved by the Secretary of War on December 2, 1924, governing the pool level and maintenance of flashboards at the Federal dam (R. 53, 307-309). These regulations provide for the maintenance of flashboards on the east or main spillway of the dam to a height of 17.2 feet barge canal *datum,* which is the same as the height of the crest of the west or auxiliary spillway (R. 54).

On June 16, 1925, the petitioner, acting with due care and skill (R. 56), erected flashboards on the east or main spillway conformably with the provisions of said regulations (R. 54, 55).

The flashboards thus erected raised the elevation of the water at the tail races of respondents' plants (R. 43), and thereby caused a loss of head to respondents' plants (R. 56).

Specification of Errors.

Each of the State courts erred:

1. In refusing to hold that the Federal Water Power Act, the said license of the Federal Power Commission issued to petitioner and the said regulations, approved by the Secretary of War, constituted and afforded to petitioner a title, right, privilege and immunity to install and maintain said flashboards on said Federal dam.

2. In refusing to hold that, in installing and maintaining said flashboards, petitioner acted for and as

an agency of the Government of the United States for the improvement of navigation, in furtherance of interstate and foreign commerce.

3. In holding that petitioner, in performing the acts complained of, was not immune from interference by the courts of the State.

4. In holding that the installation of the flashboards was not an aid to navigation, thus substituting its judgment on that subject for the judgment of the Federal authorities who were clothed by Congress with power to determine that question.

5. In holding that the purpose of the Government of the United States, in providing for the installation of said flashboards, was not to aid navigation for the use and benefit of interstate and foreign commerce.

6. In refusing to hold that the provisions of the Fifth Amendment to the Constitution of the United States do not entitle respondents to maintain this action.

7. In refusing to hold that the provisions of Section 10 (*c*) of the Federal Water Power Act (U. S. Code, Title 16, ch. 12, Sec. 803 (*c*)) do not entitle respondents to maintain this action.

8. In holding that respondents' lands were flooded by the maintenance of said flashboards (R. 43), which finding is unsustained by the evidence (R. 109-110).

Summary of Argument.

I. Petitioner's complete justification is found in its license from the Federal Power Commission, as sup-

plemented by the regulations approved by the Secretary of War, which govern the installation of the flashboards.

1. The Hudson and Mohawk rivers are navigable waters of the United States.

2. Navigation in the Hudson River is subject to the control of Congress.

3. Such control has been undertaken by Congress.

4. Congress, having control over the navigation of the Hudson, could grant to petitioner the right to place obstructions in the river in the interest of navigation.

5. The installation of flashboards is beneficial to navigation.

(*a*) The Federal Power Commission has so found.
(*b*) Such finding by the Federal Government is conclusive and not subject to judicial review.
(*c*) The testimony substantiates such finding.

6. What the Federal Government, itself, could have done legally it can lawfully accomplish through the agency of the petitioner.

7. The motive of the Federal Government in authorizing the flashboards and of the petitioner in erecting them is immaterial.

8. Section 10 (*c*) of the Federal Water Power Act does not give respondents a cause of action.

9. The just compensation clause of the Fifth Amendment to the Constitution of the United States does not afford a basis for the judgment herein.

(*a*) There has been no "taking."

(*b*) There has been no deprivation of "private property."

II. Federal questions of substance are involved.

III. A writ of certiorari should be granted.

ARGUMENT.

Point I.

Petitioner's complete justification is found in its license from the Federal Power Commission, as supplemented by the regulations approved by the Secretary of War, which govern the installation of the flashboards.

1. *The Hudson and Mohawk rivers are navigable waters of the United States.*

R. 88, 144-145, *The Daniel Ball*, 10 Wall. 557.

(*a*) They have been so found by the trial court (R. 56), with the qualification that the Mohawk River from Lock No. 2, Erie Canal in Waterford, westerly to the Crescent Dam, is, in fact, incapable of navigation, because of the falls and rapids therein, and that navigation is carried around this stretch of the river by means of the Barge Canal (R. 44).

(*b*) The mere fact that navigation is carried around the falls and rapids by means of a canal does not make the Mohawk non-navigable, either under the law of New York or the decisions of this court.

People *v.* Gilchrist, 221 App. Div. (N. Y.) 19, 24;
People *v.* N. Y. & O. Power Co., 219 App. Div. (N. Y.) 114, 115;
Economy Light & Power Co. *v.* U. S., 256 U. S. 113;
United States *v.* Chandler-Dunbar Co., 229 U. S. 53.

(*c*) The Mohawk has been held by the New York courts to be a navigable stream.

People *ex rel.* Loomis *v.* Canal Appraisers, 33 N. Y. 461;
Danes *v.* New York, 219 N. Y. 67, 70.

2. *Navigation in the Hudson River is subject to the control of Congress.*

United States Constitution, Article I, Section 8, Clause 3;
Gibbons *v.* Ogden, 9 Wheat. 1;
Gilman *v.* Philadelphia, 3 Wall. 713, 724;
United States *v.* Chandler-Dunbar Co., 229 U. S. 53, 63.

3. *Such control has been undertaken by Congress as shown by:*

(*a*) The construction of the Federal dam, authorized by Act of Congress, approved June 25, 1910, being 36

Stat. Chapter 382, and by further appropriation by Act of Congress, approved March 4, 1913, being 37 Stat. Chapter 144 (R. 155).

(*b*) Dredging of the channel above the dam by the Federal Government (R. 163, 168, 181).

(*c*) The Federal Water Power Act, June 10, 1920, Chapter 285, 41 Stat. 1063 (U. S. Code, Title 16, Chapter 12).

(*d*) The issuance of a license to the petitioner under the provisions of the Federal Water Power Act (R. 296-307, Petitioner's Exhibit 10, filed in the office of the Clerk of United States Supreme Court).

(*e*) The regulations approved by the Secretary of War to govern the pool level and maintenance of flashboards at the Federal dam (R. 307-309).

4. *Congress, having control over the navigation of the Hudson, could grant to petitioner the right to place obstructions in the river in the interest of navigation.*

Pennsylvania *v.* Wheeling, &c., Bridge Co., 18 Howard 421;

South Carolina *v.* Georgia, 93 U. S. 4;

Miller *v.* Mayor of New York, 109 U. S. 385;

People *v.* Hudson River Connecting R. R. Co., 228 N. Y. 203; certiorari denied 254 U. S. 631.

5. *The installation of flashboards is beneficial to navigation.*

(*a*) The Federal Power Commission has so found (R. 52, 298).

The maps, plans and specifications, which the Commission found were best adapted to a comprehensive scheme of improvement and utilization of the river for purposes of navigation (R. 52, 298), contains statements by the petitioner in its application for a license that it would erect flashboards along the main spillway section of the dam, as contemplated and provided for by the corps of engineers of the United States Army, and that such flashboards, 2 feet in height, would be used on the main spillway section of the dam, utilizing the holes provided by the Federal Government for that purpose in the spillway crest (R. 50, Petitioner's Exhibit 9, pages 5, 27-28, filed in office of Clerk of United States Supreme Court).

In addition to this express finding by the Commission that flashboards are an aid to navigation, the Secretary of War has presumably so found by his approval, pursuant to Sec. 18 of the Act (16 U. S. C. § 811), of the regulations governing the use of flashboards (R. 307-309).

(*b*) Such finding by the Federal government is conclusive.

There is no room for judicial review, at the instance of a private owner along the banks of a navigable stream, of a determination by the Federal government that the flow of the stream is needed for the improvement of navigation.

United States *v.* Chandler-Dunbar Co., 229 U. S. 53, 64-65.

The determination by the duly authorized officers of the United States that the flashboards aid navigation, unless palpably fraudulent, is conclusive and binding upon the courts.

South Carolina *v.* Georgia, 93 U. S. 4;
Wisconsin *v.* Duluth, 96 U. S. 379;
Green Bay Co. *v.* Patten Paper Co., 172 U. S. 58.

A finding by a department or officer of the Federal government, detailed by Congress to determine the fact, that the erection of a given structure in navigable waters of the United States is in the interest of interstate and foreign commerce, is conclusive.

Miller *v.* Mayor of New York, 109 U. S. 385, 393-394;
Union Bridge Co. *v.* United States, 204 U. S. 364-386;
Monongahela Bridge Co. *v.* United States, 216 U. S. 177, 195.

(*c*) Even if it were open to review by the courts, the testimony of three witnesses for the petitioner shows conclusively that the use of flashboards, as erected by the petitioner, is a considerable aid and benefit to navigation (R. 144-155, 160-200, 225-226). This testimony was not contradicted or disputed by respondents, who called no witnesses to show that the use of flashboards is a detriment to navigation.

When a Federal right set up in a state court is denied there, this court will review the record and determine for itself whether there is any basis in fact

for the state court's decision and, if it finds none, it will correct the error.

Creswill *v.* Knights of Pythias, 225 U. S. 246;
Northern Pacific Railway *v.* North Dakota, 236 U. S. 585, 593;
Norfolk & Western Ry. *v.* West Virginia, 236 U. S. 605, 610;
Interstate Amusement Co. *v.* Albert, 239 U. S. 560;
Postal Telegraph & Cable Co. *v.* Newport, 247 U. S. 464, 473;
Union Pacific *v.* Public Service Corp., 248 U. S. 67;
First National Bank *v.* Hartford, 273 U. S. 548, 552-553.

(6) *What the Federal government itself could have done legally it can lawfully accomplish through the agency of the petitioner.*

(*a*) If the Federal government, itself, had built the crest of the main spillway to a permanent height of 17.2 feet, equal to the height of the auxiliary spillway, or if it had installed upon the crest of the main spillway, utilizing the concrete holes which it had placed there for such purpose, the very flashboards of which respondents complain, no one would have the temerity to urge seriously that a court should issue against the Federal government an injunction such as the state courts have granted here. Respondents in such a case would have been remediless, in the absence of any

taking of their property, because their water rights are held subject to the paramount power of Congress to make improvements in a navigable river in aid of navigation.

(*b*) It is not for the courts to forbid the completion or require the undoing of an improvement in navigable waters for which Congress, in the exercise of its lawful authority, has provided.

Wisconsin *v.* Duluth, 96 U. S. 379, 387.

(*c*) Congress may employ a state corporation as an instrumentality of the United States, and such corporation is to be regarded as the agent of the Federal government in respect to the exercise of powers conferred upon the corporation by the Federal government in furtherance of Federal ends.

Clallam Co. *v.* United States, 263 U. S. 341;
Westfall *v.* United States, 274 U. S. 256, 259;
Central Pacific Railroad *v.* California, 162 U. S. 91, 125;
Southern Pacific R. R. *v.* United States, 183 U. S. 519, 527.

(*d*) One who, as agent of the sovereign, makes an improvement, performs a public duty and is not answerable for consequential damages if the work be prosecuted with care and skill.

Transportation Company *v.* Chicago, 99 U. S. 635, 641.

(*e*) Since, under the provisions of the Federal Water Power Act, the Federal Power Commission is au-

thorized to license certain works *in aid of navigation,* the licensees so selected by it are agencies of the United States for the governmental purposes involved.

Green Bay, &c., Co. *v.* Patten Paper Co., 172 U. S. 58;

Jaybird Mining Co. *v.* Weir, 271 U. S. 609;

Alabama Power Co. *v.* Gulf Power Co., 283 Federal 606, 616, 620.

(*f*) Respondents urged in the state courts that mere permission to erect the flashboards, as granted by the Federal Power Commission in the license and by the Secretary of War in the regulations, did not constitute petitioner as the agent of the Federal Government because the Government did not *direct* the flashboards to be installed, but simply gave petitioner the *privilege* or *option* of erecting them. The Court of Appeals has sustained this argument of the respondents when it said:

> "The license granted to defendant herein does not result in any development and improvement of navigation. Its plain effect is the removal of the prohibition of Congress against the placing of an obstruction in a navigable stream; nothing more is accomplished."
>
> R. 334; 249 N. Y. 495, 502;

Also, concurring opinion of Crane, J.

R. 335; 249 N. Y. 495, 503.

To this there are several answers:

First. The same result, as far as the effect on respondents is concerned, would have been reached if

the Federal Government, itself, had installed the flashboards, using the holes that it provided for that purpose in the main spillway crest (R. 49, 50). In fact, there is nothing to prevent the Government from rightfully erecting boards now, or from *ordering* the petitioner to erect them, since, under paragraph 7 of the license (R. 52, 301) and Section 18 of the Act (U. S. Code, Title 16, Section 811), petitioner must abide by rules and regulations of the Secretary of War in the interest of navigation, "*including the control of the level of pools.*"

Second. It is not necessary to spell out a legal relationship of principal and agent. The meaning of a "governmental agency," referred to in cases cited above, such as *Alabama Power Co. v. Gulf Power Co.*, 283 Fed. 606; *Green Bay, &c., Co. v. Patten Paper Co.*, 172 U. S. 58; *Jaybird Mining Co. v. Weir*, 271 U. S. 609, and in other cases, such as *Choctaw & Gulf R. R. v. Harrison*, 235 U. S. 292, and *Indian, &c., Co. v. Oklahoma*, 240 U. S. 522, is that the petitioner is an *instrumentality* of the United States for the governmental purpose involved of aiding navigation and conserving the incidental water power, in the same way that a national bank is an "agency or instrumentality" of the Federal Government (*Waite v. Dowley*, 94 U. S. 527, 533).

Finally, the permission to erect flashboards is the same as permission to erect bridges over navigable waters, where the bridge or railroad companies are not *obliged* to erect them, but if they do, the companies

erecting them are acting as instrumentalities of the United States and the bridges become lawful structures.

Pennsylvania *v.* Wheeling, &c., Bridge Co., 18 Howard 421;

Miller *v.* Mayor of New York, 109 U. S. 385;

Union Bridge Co. *v.* United States, 204 U. S. 364;

Monongahela Bridge Co. *v.* United States, 216 U. S. 177.

7. *The motive of the Federal Government in authorizing the flashboards and of the petitioner in erecting them is immaterial.*

The Court of Appeals said:

> "The evidence on the trial clearly establishes the fact that the flashboards are neither authorized by the Commission nor maintained by defendant except for the private purposes of defendant in developing power and that their erection has no relation to 'the interests of navigation' except that they must not interfere with navigation" (R. 335, 249 N. Y. 495, 502).

Here, again, the Court of Appeals erred in substituting its judgment for that of the Federal Government (Point I, 5*b*, *supra*, pp. 15-24). Since the Federal Government has decided that the flashboards aid navigation, it is of no consequence that additional power is also created. The same argument that the use of a given structure was a commercial one, rather than an improvement in navigation, was answered by this court

in *United States v. Chandler-Dunbar Co.*, 229 U. S. 53, 72-73.

Petitioner has purchased from the Federal Government the right to erect these flashboards, which were specified in the application for a license (R. 50), and in paying the license fee to the Government, called for in Section 12 of the license (R. 302), it has acquired from the Government something which the Government owned and had the right to sell.

Kaukauna Co. *v.* Green Bay Co., 142 U. S. 254, 273;

Green Bay Co. *v.* Patten Paper Co., 172 U. S. 58.

8. *Section 10-C of the Federal Water Power Act does not give respondents a cause of action.*

(*a*) The last sentence of this section reads as follows:

> "Each licensee hereunder shall be liable for all damages occasioned to the property of others by the construction, maintenance, or operation of project works or of the works appurtenant or accessory thereto, constructed under the license, and in no event shall the United States be liable therefor" (16 U. S. C., Sec. 803*c*).

(*b*) While the Court of Appeals based its decision primarily upon the ground that the license from the Federal Power Commission affords no protection to petitioner as against the claims of respondents, it stated that it had no reason to assume that the Federal Power Commission intended, by its license, to

exempt petitioner from liability for damages to the rights of others (R. 335, 249 N. Y. 495, 503; concurring opinion of Cardozo, Ch. J. R. 336, 249 N. Y. 495, 503-504).

(*c*) This section does not create any new right or liability, but was inserted by Congress in order to protect the United States against any claim which might be made against it for damages to which a third party might be entitled under already existing law. It does not say that anyone who sustains damages may recover from the licensee; *but,* if damages be recoverable, such recovery must be had from the licensee and not from the United States. It is an immunity clause for the protection of the United States and not for the benefit of third parties.

While no suit can be maintained against the United States without its consent, nevertheless, in certain specified instances, such consent had been given by the Tucker Act and amendments thereto (Judicial Code, Sec. 24, par. 20; U. S. Code, Title 28, Sec. 41, par. 20). It was to negative liability on the part of the Government under the Tucker Act for the acts of any licensee, that Congress inserted this provision.

Moreover, claims for damages might be recovered against the petitioner if the work which it did had been performed unskillfully or in a careless and negligent manner; but, where a structure is lawfully erected under governmental authority, and with proper care and skill, damages are not recoverable because there is no trespass.

Transportation Co. *v.* Chicago, 99 U. S. 635, 641.

The word, "damages," as used in this section, must be taken in the legal acceptation of the term as meaning the compensation which the *law* will award for an injury done.

Scott *v.* Donald, 165 U. S. 58, 86.

If there be no legal liability for damages from the performance of an act, this section has no application; for it simply means that, if a right to recover damages should arise, such right must be enforced against the licensee and not against the Federal Government.

The Federal Government could have erected on the east spillway flashboards 2 feet in height; or it could have built the crest of the east spillway 2 feet higher, without liability to the respondents. It could also properly authorize the installation of such flashboards by petitioner, declaring, however, as in Section 10-c, that for any lack of care or skill petitioner, but not the United States, shall be liable.

(*d*) With respect to Section 21 of the Act (U. S. Code, Title 16, Sec. 814, which gives to a licensee the power of condemnation, mentioned by the Court of Appeals in connection with Section 10-c of the Act, it is submitted that the proper construction of that section limits its application to a case where it is necessary for the licensee to *take* the property of others in the operation of the project works, and does not extend it to a case where consequential damage may result to third parties by the lawful acts of the licensee. This section, also, delegates a sovereign right to the

licensee, but does not purport to create any new right for the benefit of third parties.

9. *The just compensation clause of the Fifth Amendment to the Constitution of the United States does not afford a basis for the judgment herein.*

(*a*) There has been no *taking*.

A distinction must be drawn between *consequential damages* and an actual *taking* of property of a riparian owner.

Bedford *v.* United States, 192 U. S. 217, 224.

Incidental damages resulting from the lawful exercise of a governmental power is not a taking.

Transportation Company *v.* Chicago, 99 U. S. 635, 642;

Gibson *v.* United States, 166 U. S. 269, 275.

That of which respondents have been deprived is subservient to navigation. Their right to use the water of the Mohawk has always been burdened with a servitude, namely, that the flow of the stream might be changed by governmental power. They cannot now complain if the Government, through its lawfully constituted agency, asserts the right of utilizing its governmental easement.

Gibson *v.* United States, 166 U. S. 269, 276;

United States *v.* Chandler-Dunbar Co., 229 U. S. 53, 70.

(*b*) Neither have respondents been deprived of *private* property within the meaning of the Constitution.

Running water in a navigable stream is not capable of private ownership.

United States *v.* Chandler-Dunbar Co., 229 U. S. 53, 69;
R. 333; 249 N. Y. 495, 501.

The right of a riparian owner to use the water of a navigable stream is subject to the paramount right of the Government to make improvements for navigation purposes, and the property right of the individual is qualified to that extent. When the dominant right of the Government is exercised, the servient right must give way. Even if the riparian right is private property, it nevertheless is qualified in that it is subservient to the public requirements for navigation and commerce, and a deprivation of that right, under such circumstances, is not a "taking" of *private property,* but rather an assertion of the public servitude attached to the property right and subject to which it is held.

Gibson *v.* United States, 166 U. S. 269, 271;
United States *v.* Chandler-Dunbar Co., 229 U. S. 53, 70;
Union Bridge Co. *v.* United States, 204 U. S. 364, 392, 398, 399;
Transportation Co. *v.* Chicago, 99 U. S. 635;
Scranton *v.* Wheeler, 179 U. S. 141, 163;
Lewis Blue Point Oyster Co. *v.* Briggs, 229 U. S. 82, 89;
Appleby *v.* City of New York, 271 U. S. 364, 393.

(*c*) Cases such as *Monongahela Navigation Co. v. United States*, 148 U. S. 312; *United States v. Lynah*, 188 U. S. 445; *United States v. Cress*, 243 U. S. 316, and *Pumpelly v. Green Bay Co.*, 13 Wall. 166, are distinguishable.

The *Monongahela* case has been explained by this court as resting not on proprietary rights but on the doctrine of estoppel, because there the lock and dam had been constructed by the landowner at the instance and implied invitation of Congress. In addition, the physical structures were taken and used by the United States.

Lewis Blue Point Oyster Co. *v.* Briggs, 229 U. S. 82, 89;

Greenleaf Lumber Co. *v.* Garrison, 237 U. S. 251, 264-266.

The *Lynah* case involved "an actual invasion and appropriation of land as distinguished from consequential damage."

Bedford *v.* United States, 192 U. S. 217, 225.

The *Cress* case is distinguishable in that the decision turned upon the construction of the so-called Tucker Act (Judicial Code, Sec. 24, par. 20; March 3, 1887; 24 Stat. 505, ch. 359) by which there is imposed upon the *Government* liability resting not upon tort but upon implied contract, where the riparian owner's title to what he claims is conceded.

In *United States v. Cress*, two cases were argued together, Nos. 84 and 718. In No. 84 the finding of the trial court was that, by reason of the erection of

the dam, plaintiff's land was *overflowed* (page 318), which was the basis of the decision in the *Pumpelly* and the *Lynah* cases.

In No. 718, while there was no actual overflowing of the upland, the damage consisted, as in the case at bar, of a loss of head to plaintiff's mill which, however, was situated on a non-navigable stream (pages 318-319). Although this court held that this was a taking of a part of the land, its decision was based upon the law of Kentucky, under which ownership of the bed of the stream is in the upland owner, and, therefore, the right to have the water flow away from the mill dam unobstructed was not a mere easement or appurtenance (page 330).

In the principal case, however, the respondents do not own the bed of the Mohawk (*Canal Appraisers v. People ex rel. Tibbits*, 17 Wend. (N. Y.) 571; *Fulton Light, Heat & Power Co. v. New York*, 200 N. Y. 400, 413; *Danes v. New York*, 219 N. Y. 67), nor have they acquired title by adverse possession (*Hinkley v. New York*, 234 N. Y. 309); hence, their right to have the water flow away from their mills unobstructed *is* a mere easement or appurtenance, subject to the right of the Government to change the flow of the stream in the interest of navigation.

That such change may be made without the necessity of responding to the upland owner in damages, as far as the Mohawk and Hudson Rivers are concerned, has been the law in New York since the decision in *Canal Appraisers v. People ex rel. Tibbits*, 17 Wend. (N. Y.) 571 (1836).

When the State of New York built the old State dam across the Hudson River at Troy, which was replaced by the present Federal dam (R. 41), the water of the Mohawk was backed up so as to destroy a mill site on the middle sprout of the Mohawk (*Canal Appraisers v. People ex. rel. Tibbits, supra*). The highest court of New York held in that case that if, in the improvement of the navigation of a public river, the waters of a tributary stream are raised so as to destroy a valuable mill site thereon, and the stream be generally navigable, although not so at the particular locality of the mill site, the owner is not entitled to damages within the provisions of the canal laws, directing compensation to be made for private property taken for a public use, his right to occupy the bed of the stream being merely *incidental, contingent and subordinate* to the paramount right of the state to improve the navigation of public rivers.

That case, particularly in point with the principal case as it arose in almost identically the same spot on the same river, has been expressly approved by the Court of Appeals of New York in *People ex rel. Loomis v. Canal Appraisers,* 33 N. Y. 461, and again in the more recent case of *Danes v. New York,* 219 N. Y. 67. The authority of the *Tibbits* case was recognized by this court in *United States v. Cress,* at page 322, and the reason therefor was stated to be because the bed of the Mohawk was the property of the state.

The cardinal distinction between the principal case and *United States v. Cress, United States v. Lynah* and

Pumpelly v. Green Bay Co. is that, in those cases, there was a physical invasion of property by backing water upon it, rendering it unfit for use; but here there is only, at the most, *a partial destruction of the use of the water, itself,* in which, as against the Federal right to control navigation, there is no property right. Such distinction is emphasized in the dissenting opinion of three of the justices of this court in the *Lynah* case, who rested their dissent upon the ground that the raising of the water by the Government had simply deprived the riparian owner of his ability to drain into the river (pages 481-484). That decision turned upon the construction given by this court to findings of the trial court, as to whether or not the plaintiff's lands were flooded. The majority in the *Lynah* case held that there was a physical invasion. In the view of the minority, however, there was no such physical invasion, but merely a deprivation of the ability of the upland owner to drain into the river. It is submitted by petitioner that this is exactly what has occurred in the principal case, namely: the raising of the water as it flows past respondents' lands deprives them of a certain fall in the water. In the *Lynah* case, enhanced value of the upland was obtained by draining water into the river. In this case, it is derived by diverting a part of the water of the Mohawk into a canal and then draining it back into the river.

In the complaint the theory of respondents' case is based entirely upon the allegation that the act of the petitioner "has deprived these plaintiffs of the use

of a part of their said water power and has reduced the head available by upwards of two feet'' (R. 21), and not upon a claim that there has been physical damage to respondents' property caused by any *overflowing* of the upland, as existed in the *Pumpelly, Cress* and *Lynah* cases.

If the Federal government, by raising the elevation of the dam, had caused the water of the Mohawk to flood respondents' lands (as happened in the *Lynah* case), there can be no question but that the Government would have to respond in damages, as that would constitute an actual *taking* of property; but where the increase in elevation at respondents' tailraces does not result in overflowing the upland, but merely decreases the height of the fall of the water which respondents had previously enjoyed, there is no flooding of the upland and, consequently, no *taking* for which the petitioner must respond in damages.

It is true that the trial court in this case found that the maintenance of the flashboards caused a backing of water upon the lands, buildings and hydraulic plants of the respondents (R. 43). Such finding, however, is not sustained by the evidence, as the only proof on this point is contained in the last two questions and answers on page 109 and the first two questions and answers on page 110 of the record. Just as this court felt constrained to construe the findings of the trial court in the *Lynah* case, so it will examine the record here, in order to ascertain whether or not a Federal right, set up by petitioner, has been denied by the state courts because of an erroneous finding of fact. Such

is the power of this court (Point I, 5, *c, supra,* page 16 ~~25~~).

(*d*) The Mohawk River flows into the Hudson through various branches or sprouts (R. 85). Suppose Congress had determined to close the fourth sprout of the Mohawk, upon which respondents' plants are located, by diverting all the water therein into another sprout for purposes of navigation. Respondents would then be deprived of their use of the water, but that would not be a taking requiring compensation. That is exactly what occurred in *South Carolina v. Georgia,* 93 U. S. 4. Neither would respondents be entitled to compensation if Congress, for purposes of navigation, compelled them to remove their dam in the Mohawk, without which they could not develop power (*United States v. Chandler-Dunbar Co., supra,* and various bridge cases). A riparian owner has a qualified right to use the water as it flows past his upland and, also, he has a qualified right of access to deep water, but, if the latter can be taken away without compensation, as held by this court in *Gibson v. United States* and *Scranton v. Wheeler,* certainly the former can be taken away also, without violating the Fifth Amendment; for both are not absolute property rights, but each is burdened with the servitude of Federal control over navigation and subject to the risk that Congress may make changes in the interest of navigation which will destroy their use.

Point II.

Federal Questions of Substance are Involved.

1. The state courts have substituted their opinion on the benefit of flashboards to navigation for the determination of duly authorized Federal authorities, which is not in accordance with decisions of this court.

Point I, 5, *b*, *supra*, page 13. 15

2. The right of the Federal Government to sell excess power is questioned by the Court of Appeals.

Kaukauna Co. *v.* Green Bay Co., 142 U. S. 254, 273;

Green Bay Co. *v.* Patten Paper Co., 172 U. S. 58;

United States *v.* Chandler-Dunbar Co., 229 U. S. 53, 73.

3. The power of Congress to preserve and enlarge the capacity of navigable waters of the United States, which long-settled doctrine was reasserted by this court recently, has been limited by the decision in this case.

New Jersey *v.* Sargent, 269 U. S. 328, 337.

4. The right to perform an act, authorized by the Federal Government, which is within the scope of its constitutionally granted powers, has been denied by the state courts. If the decision of the Court of Appeals in this case remains undisturbed by this court, it stands as a challenge to the powers of the Federal Power Commission, as created by Congress, and to the rights of its licensees thereunder.

POINT III.

It is respectfully submitted that the writ of certiorari herein sought should be granted.

Dated February 19, 1929.

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